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# Sandy City v. John R. Smingler : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 870166-CA

UTAH COURT OF APPEALS

OF THE STATE OF UTAH

SANDY CITY,

:

Plaintiff/Respondent :

vs.

: Docketing No. 870166-CA

JOHN R. SMINGLER

: Argument Priority No. 2

Defendant/Appellant. :

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BRIEF OF RESPONDENT

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On Appeal from the Circuit Court, Salt Lake County,  
Sandy Department State of Utah the Honorable  
Phillip K. Palmer, Presiding

---

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UTAH COURT OF APPEALS  
OF THE STATE OF UTAH

SANDY CITY, :  
Plaintiff/Respondent :  
vs. : Docketing No. 870166-CA  
JOHN R. SMINGLER :  
Defendant/Appellant. :

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UTAH COURT OF APPEALS  
OF THE STATE OF UTAH

SANDY CITY, :  
Plaintiff/Respondent :  
vs. : Docketing No. 870166-CA  
JOHN R. SMINGLER :  
Defendant/Appellant. :  

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STATEMENT OF ISSUES

1. Does this court have jurisdiction of this matter due to Defendant's untimely appeal?
2. Is there sufficient evidence to affirm the trial court's finding that Defendant violated the law by not maintaining a proper lookout?
3. Did the trial court commit prejudicial error in requiring Defendant to pay \$100.00 in restitution?

STATEMENT OF FACTS

On December 9, 1986, Defendant's vehicle and a vehicle driven by Mrs. Janice Bailey collided at approximately 11050 South 1000 East, Sandy, Utah. (T. at 5-7.) Defendant was pulling out from a driveway at Alta High School. (T. at 6.) Mrs. Bailey was northbound on 1000 East, (T. at 7.), traveling at 25 to 30 miles per hour. (T.

at 14.) The Defendant pulled out into Mrs. Bailey's travel lane and caused the front end of his vehicle to collide with the right side of Mrs. Bailey's vehicle. (T. at 7 and 13.) After the collision occurred, the two parties brought their vehicles to a stop, exited the vehicles and conversed with each other. While conversing, the Defendant repeatedly apologized to Mrs. Bailey for the collision. (T. at 15.)

Officer Gordon Sadler of the Sandy City Police Department was dispatched to the scene of the accident at about 4:10 p.m. (T. at 5.) Based upon his investigation, Officer Sadler formed the opinion that Mrs. Bailey was in the process of pulling over to the curb when the collision occurred. (T. at 7.) However, Officer Sadler also determined that the point of impact was past the white emergency line into Mrs. Bailey's travel lane. (T. at 7.) While at the scene, the defendant told Officer Sadler that a truck was going northbound on 1000 East, that he intended to pull out and go northbound also, that the truck then proceeded to turn into the driveway, and that after the truck turned, Mrs. Bailey's vehicle also came northbound when the collision occurred. (T. at 7.) However, a few days later the Defendant came to the Sandy City police station with his mother to talk to Officer Sadler. This time the Defendant gave a different story. The Defendant said the truck was going southbound, that he intended to

turn and go south into the driveway, that he proceeded to pull out into the street as the truck turned, and after the truck turned the collision occurred. (T. at 8,9.) While at the scene of the collision Officer Sadler asked to see the Defendant's drivers license. The Defendant was unable to produce a license. (T. at 7,8.)

At the trial Mrs. Bailey testified that she was intending to pull over to the curb to pick up her son from school, but not at the location where the collision occurred. She was going to pull over further down the street (T. at 14, 16.) Mrs. Bailey testified that she could see the Defendant's vehicle pulling out into her lane before the collision occurred. (T. at 13.) The Defendant admitted at the scene to Officer Sadler that he did not ever see Mrs. Bailey's vehicle before the collision. (T. at 8.) At trial, the Defendant admitted that the truck blocked his vision down the street, and that he could not see past the truck to determine if he could pull out safely. (T. at 21). Defendant also admitted that in spite of the truck blocking his line of vision down the street he pulled out into the street. (T. at 24.)

After the introduction of evidence, the Hon. Judge Phillip K. Palmer stated that the law provides that whenever a person is emerging from a driveway, he has a duty to yield to all vehicles who present an immediate hazard. (T. at



24.) Judge Palmer then stated he believed the most credible evidence was that the Defendant was out in the roadway, and that Mrs. Bailey had not changed her course of travel. (T. at 25.) Judge Palmer also determined that the Defendant failed to yield to a vehicle that was lawfully on the through highway. (T. at 25.) Based upon these factual findings, Judge Palmer concluded that the Defendant violated the law by failing to maintain a proper lookout. (T. at 25.)

Judge Palmer proceeded to sentence the Defendant. (T. at 25.) Judge Palmer informed the Defendant he had a right to appeal within 30 days. (T. at 25.) Judge Palmer asked the Defendant if he had a part-time job, and the Defendant said yes. (T. at 25,26.) Judge Palmer then sentenced the Defendant to pay \$75.00 on the improper lookout charge, and \$25.00 on the driving without a license charge, although this charge would be vacated if the Defendant showed proof of a license within 30 days. (T. at 26.) Judge Palmer told the Defendant he may go. (T. at 26.) However, while Defendant was still present, counsel for Sandy City asked the Judge if he could check with Mrs. Bailey concerning any restitution. (T. at 26.) Judge Palmer asked the Defendant if he had any liability insurance. The Defendant stated that he did not have any. (T. at 27.) Mrs. Bailey stated her insurance company paid for the repairs, but that she was required to pay a \$100.00

deductible. (T. at 27.) Judge Palmer then required the Defendant as part of his sentence to pay \$100.00 to Mrs. Bailey. (T. at 27, 28.) Judge Palmer then told the Defendant that he may go. (T. at 28.) At no time did the Defendant object to the imposition of restitution.

#### SUMMARY OF ARGUMENTS

This court should dismiss the Defendant's appeal due to lack of jurisdiction. There is no jurisdiction because of the Defendant's untimely filing of his notice of appeal beyond the 30-day appeal period.

There is sufficient evidence to support the trial court's conclusion that the Defendant violated the law. Such facts are that Defendant admitted to pulling out into the street without being able to view oncoming traffic, the collision occurred in the travel lane portion of the street, and the Defendant admitted to not having seen the other vehicle before the collision.

The imposition of restitution was appropriate because all of the parties were before the court when restitution was discussed and the trial court asked the Defendant certain questions concerning his ability to pay which included whether Defendant had liability insurance. The Defendant had ample opportunity to ask questions concerning the restitution amount and to object, but he at no time did

so and was not prejudiced in any manner by being required to reimburse the other driver.

#### ARGUMENT I

#### DEFENDANT'S APPEAL SHOULD BE DISMISSED DUE TO LACK OF JURISDICTION

Rule 26 of the Utah Rules of Criminal Procedure provides that an appeal is to be taken within thirty (30) days after entry of judgment. See, §77-35-26(d)(1), Utah Code Ann. (1953 as amended). Rule 26 also provides that, "no appeal shall be dismissed except for a material defect in the taking thereof, or for failure to perfect the appeal." §77-35-26(d)(2), Utah Code Ann. (1953 as amended).

The Defendant has failed to perfect his appeal in that he failed to file his Notice of Appeal within thirty (30) days after the entry of judgment and sentencing. The trial was held, and judgment entered, on April 2, 1987, and the Defendant was personally notified by Judge Palmer that he had 30 days to appeal. Defendant filed a notice of appeal with this court on May 6, 1987. This was beyond the thirty (30) day period prescribed by Rule 26.

The Utah Supreme Court has set forth in the case of State v. Boggess, 601 P.2d 927 (Utah 1979), that the time within which an appeal must be taken is jurisdictional," and that the case was not properly before the court because the appeal was not timely. Id. at 928, 929. Therefore, this

court lacks jurisdiction to hear this appeal due to the Defendant's untimely filing.

The Utah Supreme Court has reaffirmed this principle in the case of State v. Johnson, 635 P.2d 36 (Utah 1981), wherein it was held that, "the 30-day period for filing a notice of appeal . . . is jurisdictional and cannot be enlarged by this Court. Out-of-time appeals must be dismissed." Id. at 37.

Rule 4 of the Rules of the Utah Court of Appeals also provides that an appeal must be taken within 30 days. Subsection (e) of Rule 4 provides for an extension of the time to appeal upon motion filed within 30 days after expiration of the original 30-day appeal period. No such motion has been filed in this case. Therefore, this court should dismiss defendant's appeal for lack of jurisdiction.

#### ARGUMENT II

#### THERE WAS SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF IMPROPER LOOKOUT

The standard of review for factual findings of a court sitting without a jury is to give deference to the trial court and not overturn its findings if they are adequately supported by the evidence. Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985). Moreover, the standard of review for a bench trial is "one approximating the 'clearly erroneous' standard used in federal courts." Id. (citations omitted).

The trial court in this matter was not clearly erroneous in finding that the Defendant had violated the law, and the judge's findings are adequately supported by the evidence. First, and most important, deference should be given to the judge, because as the finder of fact he is the one best able to not only hear the testimony but to observe the witnesses and to judge their demeanor, and apparent frankness or lack thereof. The judge is the one best able to ascertain the credibility of the witnesses. In this case, Judge Palmer, based upon his observations, ascertained that the more credible evidence was that the Defendant's vehicle had rolled out into the travel portion of the through street and collided with Mrs. Bailey's vehicle. The unrefuted testimony by Officer Sadler was that the point of impact was in the travel portion of the street. Mrs. Bailey herself testified that she had not changed her course of direction. Even if the trial court found that the evidence showed that Mrs. Bailey was pulling over, that finding would not have been determinative. What is significant and determinative is the fact that Mrs. Bailey was still lawfully within her travel lane. Also of great importance is the Defendant's own admissions that he moved his vehicle out into the street at a time when his vision down the street was obscured by another vehicle. This

obviously indicates a failure to keep a proper lookout for other vehicles on the street.

Concerning Judge Palmer's statement that a driver has a duty when emerging from a driveway to yield to all vehicles that may present an immediate hazard, it is apparent from the record that this statement was preclusory to his finding that the Defendant did not yield to Mrs. Bailey. The reasonable inference to be derived therefrom is that Judge Palmer used this finding to support his conclusion of law that the Defendant did not maintain a proper lookout. In any event, this court is obligated pursuant to the standard of review on appeal to give deference to the trial court's conclusion unless there is no reasonable evidence to support that conclusion.

Such other facts which support the trial court's conclusion are that the Defendant came out into the street without stopping, the Defendant's apologetic attitude after the accident occurred, the Defendant's admission that he pulled out without being able to see beyond the truck, the Defendant's admission that he did not see Mrs. Bailey's vehicle before the collision, and the fact that the Defendant changed his story after a few days.

### ARGUMENT III

#### THE DEFENDANT WAS PROPERLY REQUIRED TO PAY RESTITUTION

Counsel for Plaintiff concedes that pursuant to §76-3-201(3)(a)(i), Utah Code Ann. (1953 as amended), the trial court is required to make the reasons for restitution a part of the record. Counsel for Plaintiff also concedes that Judge Palmer did not make his reasons a part of the record. However, of significance is whether this error constituted prejudicial error. The Utah Supreme Court set forth in the case of State v. Stayer, 706 P.2d 611 (Utah 1985), that:

In the case before us, there is ample record evidence from which the trial court could have found that restitution was proper. Notwithstanding the mandate of the statute that the trial court's reasons be included as part of its order, we believe that the failure to do so in this case was harmless error.

Id. at 614. Thus, there must be a showing of prejudicial error in order to overturn the trial court's order of restitution.

The error of the trial court in not making its reasons for restitution a part of the record was harmless. The main fact supporting this conclusion is that when the question of restitution was raised, the Defendant was present and before the court at all times. It is evident from the record that Judge Palmer asked the Defendant

questions with regards to his ability to pay restitution. The Defendant stated that he did not have liability insurance and that he did have a part-time job. At the close of the record, it is obvious that the Defendant was still before the trial court as Judge Palmer ordered him to pay restitution, and the first \$100 he paid would go to restitution, and after this imposition, Judge Palmer told the Defendant he may go.

The Defendant had ample opportunity to question Mrs. Bailey concerning the deductible amount, to present any statements of his own, or to object to the imposition of restitution. In fact, §76-3-201(3)(c), Utah Code Ann. (1953 as amended), provides that the court shall hold a hearing on restitution if an objection is made. However, the record is void of an objection or any questions concerning the requirement of restitution. Based on the facts that all of the witnesses and the Defendant were present and before the court when restitution was considered, and that the defendant did not even question the parties concerning the amount of restitution, it is clear that it was not prejudicial in any way to require the Defendant to reimburse Mrs. Bailey for the amount she had to expend because the Defendant did not have liability insurance.

Counsel for appellant refers to no judicial or statutory law which makes it obligatory for an order of



restitution to be based on evidence presented by a witness, on the witness stand while under oath and subject to cross-examination. Seeing as there are no such requirements, Defendant's arguments to the same are without merit.

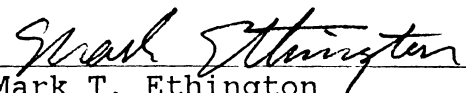
#### CONCLUSION

The evidence presented at trial was more than adequate to support a conclusion that the Defendant violated the law by not maintaining a proper lookout. Also, it was proper for the court to require restitution to the other driver.

More importantly, this court lacks jurisdiction because Defendant's appeal was untimely taken.

Therefore, Respondent respectfully requests this court to dismiss Defendant's appeal, or in the alternative, affirm the trial court's conviction of Defendant and imposition of restitution.

DATED this 22 day of July, 1987.

  
Mark T. Ethington  
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#### CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of July, 1987, I served four copies of the foregoing Brief of

Respondent upon the following, by hand delivering copies  
addressed to William G. Fowler, J. Angus Edwards, FOWLER &  
PURSER, 340 East Fourth South, Salt Lake City, Utah 84111.

A handwritten signature in cursive script, reading "Mark Ellington", written over a horizontal line.